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No. 958

In the

Supreme Court of the United States

OCTOBER TERM, 1963

PAUL REVERE LIFE INSURANCE COMPANY,
Petitioner,

v.

FIRST NATIONAL BANK IN DALLAS, ADMINISTRATOR OF THE ESTATE OF LOY THOMAS BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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Petitioner, Paul Revere Life Insurance Company, respectfully requests that the Court grant rehearing of its order dated May 18, 1964, which denied certiorari, and that the Court now grant the petition for certiorari previously filed herein, which presented this question:

> Whether the Court of Appeals may, contrary to the decision of this Court in *Meredith v. Winter Haven*, 320 U.S. 228 (1943), "abstain" from deciding a diversity case between private litigants merely because the state law is unclear or unsettled.

The very obvious importance of this question and its critical impact upon the functioning of the federal judiciary and upon federal jurisdiction, practice and procedure were discussed in the petition for certiorari.

It is improbable that this question will again be presented to this Court at any time within the next several years.

Yet, it is imperative — to federal district courts and courts of appeals, to litigants and prospective litigants (and their attorneys) before federal tribunals, to state courts to whom diversity litigation will be relegated for decision by the abstention of federal courts — that this question be answered, *just as soon as possible*, in order to dispel the existent confusion and uncertainty as to whether a federal trial or appellate court may (or, indeed, must) "abstain" in a diversity case if the state law is unresolved or difficult of determination. Thus, grounds exist for this petition for rehearing within those grounds specified in Rule 58(2), as illustrated by *Schriber-Schroth Co. v. Cleveland Trust Co.*,

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The need for the petition for certiorari in the present case to be granted by this Court, in order that the confusion and uncertainty of the bench and the bar as to the continued vitality of *Meredith v. Winter Haven* and as to the proper limits of abstention in diversity cases be eliminated, was strongly urged in *Recent Developments in the Law of Abstention*, Address by Charles L. Gowen, Esq., Attorney, Atlanta, Ga., on May 15, 1964 before the Judicial Conference of the Fifth Circuit in Ft. Worth, Texas — and is similarly emphasized in Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals"*, 73 Yale L.J. 850-72 (April 1964).

Certainly, additional expressions of concern as to the existence and continuation of this confusion and uncertainty which now clouds diversity jurisdiction will be forthcoming, particularly in view of the denial of certiorari to review the opinion of the Court of Appeals below. See the references in footnotes 2, 3 and 4 of the petition for certiorari filed herein. Cf. Note, 64 Col. L. Rev. 766, 768 at fn. 28 (1964); cf. Friendly, J., *In Praise of Erie — and of the New Federal Common Law*, 39 Record of N.Y.C.B.A. 64, 76-77 (Feb. 1964).

305 U.S. 47, 50 (1938) (Petition for rehearing showing that other litigation which would present the question to the Court was improbable)].

That this Court will not be afforded an opportunity to answer this critical question within the foreseeable future is graphically demonstrated by the fact that this question would not have been presented even by the present case — i.e., the Court of Appeals below would not have ignored *Meredith v. Winter Haven* and abstained in the instant diversity case on the ground that the state law was unclear and unsettled -- had it not been for the happenstance of this extraordinary circumstance: the participation en banc by all nine judges of the Fifth Circuit in the consideration of this "routine" diversity case.

To illustrate, consider that within the five years following the 1959 opinion of this Court in *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959), the Fifth Circuit had ample opportunity to make the decision it rendered below in any one of a number of diversity suits which involved unclear or undetermined state law. Yet, in all of these cases the Fifth Circuit continued to follow *Meredith v. Winter Haven* and to render decision despite the unclarity or unsettled posture of applicable state law, albeit oftentimes vigorously complaining, as in *Ford Motor Co. v. Mathis*, 322 F. 2d 267 (5th Cir. 1963), that:

> * * * Writing with an *Erie*-Texas pen, it might be that, as of old, the Moving Finger writes, and having writ, moves on. But it may be that having written, what we write is soon erased. This is not the last word, only the latest. And before the slug drops in a St. Paul

> linotype, the first writing Texas court may boil down the lead to so much dross. Such are the perils of diversity jurisdiction."

See also *Smoot v. State Farm Mutual Automobile Ins. Co.*, 299 F. 2d 525, 529 (5th Cir. 1962), and those cases cited in the concurring opinion below of Brown, J., 328 F. 2d at 485-86, fn. 4.9 (petition for certiorari, pp. 7B-9B).

The reason why the Fifth Circuit waited some five years after the *Thibodaux* decision to finally, in the present case, abstain in a diversity suit because of "difficult or unsettled state law" is, upon reflection, apparent. A three-judge panel of the Court of Appeals was simply not going to be so presumptious as to overrule a definitive Supreme Court decision like *Meredith v. Winter Haven*, particularly since this Court has studiously avoided questioning the continued validity of that case. From the standpoint of both practicality and the working relationship between the judges themselves in a matter of such critical effect, the consideration and participation of *all* of the judges of the Court of Appeals was a necessary prerequisite to such a monumental and adventuresome undertaking.

However, a diversity case very rarely, if ever, involves an unusually important or novel question warranting the consideration of that case by all of the judges of the Court of Appeals, rather than the normal three-judge panel. Thus, only the highly extraordinary circumstance in the present

Meredith v. Winter Haven has been cited approvingly by this Court in the *Thibodaux* opinion, 360 U.S. at 27; in *Clay v. Sun Ins. Office*, 363 U.S. 207 (1960); in *McNeese v. Board of Education*, 373 U.S. 668, 673 fn. 5 (1963); and in *England v. Louisiana State Board of Medical Examiners*, * * * U.S. * * *, 11 L. Ed. 2d 440, 451-52 (1964) (concurring opinion).

case of one panel of judges questioning the validity of a very recent decision by another panel permitted the en banc hearing of this diversity suit by all of the nine judges of the Fifth Circuit for the purpose of avoiding a conflict in their decisions — and permitted the rendition by the full court of the diversity-abstention decision rendered below, some five years after *Thibodaux* was decided by this Court.

Certainly this exceptional situation of a conflict between panels in practically identical diversity cases — and the resultant en banc hearing of a diversity case involving unclear or unsettled state law by all of the judges of a Court of Appeals — is not likely to recur in any other Circuit at any time within the foreseeable future. Yet, absent this unusual circumstance, a three-judge panel will simply be precluded by practicalities either from making such a drastic decision itself or from following the opinion rendered below by the Fifth Circuit. *Thus, it is improbable that there will be an appeal from any other Circuit presenting to the Court the critical question posed by the present petition for certiorari at any time within the next several years.* Indeed, the chances of this fundamental abstention-diversity question being presented by a case from any other Court of Appeals are rendered even more unlikely by the fact that other Circuits have shown little interest in the application of the abstention doctrine in diversity cases as contrasted with the Fifth Circuit, "where through repeated failures to divine state trends, the judges seem to have become infected with

[1] For example, seemingly the last time this occurred in the Fifth Circuit prior to the instant case was some 22 years ago in *Sun Oil Co. v. Burford*, 130 F. 2d 10 (5th Cir. 1942).

a strong disinclination to grapple with testy state law problems." Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals"*, 73 Yale L.J. 850, 863-64 (April 1964). See concurring opinion below of Brown, J., 328 F. 2d at 486-87 (petition for certiorari pp. 7B-9B).

Similarly, it is equally improbable that this question will be presented, at least within some foreseeable time, by any other appeal from the Fifth Circuit. While the Fifth Circuit will certainly continue to abstain in diversity cases involving unclear or unsettled state law since the decision it rendered in this case has been deemed not "certworthy", the normal and understandable reaction of litigants and their attorneys subjected to abstention by the Fifth Circuit (or by district courts within this circuit) is to return to the state courts to put an end to their already prolonged litigation — and to let the far-reaching question of the propriety of such abstention be presented to this Court as best it may, at some other time, by some other person. Without doubt (and despite

For example, to date the Fifth Circuit has abstained in three diversity cases on the grounds that the state law was unclear — i.e., the two cases decided in the joint opinion below, *United Services Life Ins. Co. v. Delaney* and *Paul Revere Life Ins. Co. v. First National Bank, Administrator*, and in a subsequent "pilot-passenger" case which followed the opinion below, *St. Paul Mercury Ins. Co. v. Price*, 325 F. 2d 687 (5th Cir. March 26, 1964).

Of these three cases, appeal from the abstention decision was taken to this Court only in the present case. In the *Delaney* case, suit for declaratory judgment has been filed in the state court in San Antonio, no judgment has yet been rendered by the trial judge and, with forthcoming appeals first to the Texas Court of Civil Appeals and then to the Texas Supreme Court, it will be, under usual conditions, a very minimum of at least some 12-14 months, and very probably even longer, before final decision is rendered on the issue of state law by the Texas Supreme Court. The third case, *St. Paul Mercury Ins. Co. v. Price*, has not yet been filed in the state court in El Paso, but counsel for the appellant in that case advises that no petition for certiorari will be filed from the abstention decision of the Fifth Circuit.

this Court's repeated admonitions that refusal of certiorari carries no implication whatever as to the Court's views on the merits of the case it has declined to review) the practical and necessary effect of denial of certiorari in this case — when added to this strong initial, and perhaps correct, reaction not to become embroiled in any quixotic controversy over such a nebulous and abstract principle as abstention — can only be to greatly discourage, possibly to totally eliminate for at least a long period of time, any future appeal in an abstention-diversity decision of the Fifth Circuit.

The importance of the question presented by the petition for certiorari cannot be exaggerated. Until this question is answered by the Court in some manner — by opinion, after argument, summary affirmance or reversal of the decision below, or even by the extraordinary method of appropriate notation on the denial of certiorari — the federal trial and appellate judges and litigants and attorneys before federal tribunals can only remain confused and uncertain as to the limits of abstention in diversity cases and the continued vitality of the principles of *Meredith v. Winter Haven*, and a cloud will continue over diversity jurisdiction contrary "to a consistent and long established congressional policy to preserve, undiluted, diversity jurisdiction." Note, 73 Yale L.J. *supra*, at 872.

Since it is quite improbable that this question will again be presented to the Court at any time within the near or

foreseeable future — and since action by the Court on this critical question will not, in any sense of the word, be mooted by the fact that no appeal has been taken to this Court in the two other pilot-passenger cases in which the Fifth Circuit has abstained (see fn. 4, *supra*) — this petition for rehearing should be granted, and the Court should now grant the petition for certiorari previously filed.

Respectfully submitted,

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ORVILLE F. GRAHAME,
Worcester, Massachusetts.

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and, as hereinabove explained, is restricted to the grounds specified in paragraph 2 of Rule 58.

Jerry L. Buchmeyer

JERRY L. BUCHMEYER

PROOF OF SERVICE

COUNTY OF DALLAS)
STATE OF TEXAS)

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared Jerry L. Buchmeyer, who being by me duly sworn upon oath stated: I, Jerry L. Buchmeyer, am not a member of the bar of Supreme Court of the United States; but I am a duly licensed and practicing attorney and a member of the State Bar of Texas and have been one of the attorneys of record for petitioner herein in all proceedings had in the courts below.

I further state upon oath that upon the 22nd day of May, 1964, I served copies of the foregoing Petition for Rehearing of Order Denying Certiorari on the Respondent, First National Bank, in Dallas, Administrator of the Estate of Loy Thomas Brown and the heirs of Loy Thomas Brown, Mrs. Lorraine Brown and Sharon Brown, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to the following counsel of record in this court at their respective addresses, to, to-wit: Messrs. Robert A. Fanning, Fidelity Union Tower Building, Dallas, Texas; John H. McElhaney, 2400 Republic National Bank Building, Dallas, Texas; and Donald A. Gilley, Fidelity Union Tower Building, Dallas, Texas.

Jerry L Buchmeyer

Sworn to and subscribed before me by the said JERRY L. BUCHMEYER, this the 22nd day of May, 1964.

Ruby Foster

Notary Public in and for
Dallas County, Texas

RUBY FOSTER
NOTARY PUBLIC
DALLAS COUNTY, TEXAS